UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MR. and MRS. T., as parents and next friends of their son C. T., a minor,	)	
Plaintiffs	)	
v.	)	***Docket No. 99-202-P-H***
LEWISTON SCHOOL COMMITTEE,	)	
Defendant	)	

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Recommended Findings of Fact

A. Background and Chronology

1. The plaintiffs, Mr. and Mrs. T., are the parents of C. T., and all three are residents of Lewiston, Maine. Special Education Due Process Hearing Decision, *Lewiston School Department v. [T]* ("Hearing Dec."), included in Administrative Record, at 298. During the 1998-99 school year, C.T. was twelve years old and a fifth-grade student. *Id*. at 299.

2. The defendant is the local education agency that is responsible under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., for providing a free appropriate public education to children with disabilities residing in Lewiston. Answer/Counterclaim (Docket No. 4), Counterclaim ¶ 3.

3. C. T. is eligible for special education services under the category of "other health impaired." Hearing Dec. at 298. He has been diagnosed with attention deficit hyperactivity disorder ("ADHD") and bi-polar disorder. Hearing Dec. at 299.

4. C. T. attended kindergarten and first grade in Maine School Administrative District 52 in Greene, Maine. Transcript, Due Process Hearing # 99.055 ("Hearing Tr.") (Docket No. 13) at 224-25. While in first grade he was evaluated for possible special education services, Administrative Record at 255-56, but "no disability was determined," *id*. at 239, and only a special reading class was provided, Hearing Tr. at 225-26. C. T. was not "identified" as a special education student at this time. *Id*. at 49.

5. C. T. and his parents moved into the Lewiston school district in 1994, after he had completed first grade. Hearing Dec. at 300. C. T.'s parents enrolled him in a parochial school, where he repeated the first grade and completed second and third grade. *Id*. His parents provided C. T. with home schooling, assisted by a tutor, for his fourth-grade year. *Id*.

6. At his parents' request, Bruce J. Thurlow, Ed.D., evaluated C. T. on November 6, 1996. Administrative Record at 133. Thurlow found that C. T. "demonstrated characteristics of Attention Deficit (Combined Type) and Generalized Anxiety Disorders." *Id*. Thurlow recommended that C. T. be examined by a physician "to corroborate the ADD diagnosis." *Id*. On January 21, 1997 C. T. was examined by a nurse practitioner and a physician, and, based on reports from Thurlow and Mrs. T., they referred C. T. for a child psychiatry evaluation. *Id*. at 283-84. C.T. was evaluated in April 1997 by Thomas S. Jensen, M.D., a child psychiatrist, who stated that his working diagnoses were "ADD-combined type, Major Depressive Disorder, Somnambulism, Generalized Anxiety Disorder, and probable reading, writing, and spelling learning disabilities." *Id*. at 276. There is no indication that Jensen conducted any testing before reaching his conclusion concerning learning disabilities. Hearing Dec. at 301 n.1. Jensen first prescribed Prozac for C. T., and later Depakote. Hearing Tr. at 253-54. C. T.'s parents informed his third-grade teacher at the parochial school in April 1997 that they had learned that C. T. had attempted suicide in January 1997, Administrative Record at 276, and the

teacher recommended that they contact the defendant because the Lewiston public schools had a special education department, Hearing Tr. at 256-57.

7. On May 8, 1997 Mr. T. called Melvin Curtis, the defendant's director of special education. *Id*. at 20, 257-58; Administrative Record at 137. He told Curtis "what I had gone through with" C. T. Hearing Tr. at 258. On May 12, 1997 Curtis sent a letter to Mr. T. enclosing a "parent handbook" and stating, "At your request, my office will begin the referral process with St. Joseph's School in order to determine special education eligibility for your son." Administrative Record at 137. On October 28, 1997 Mr. T. tried once to contact Curtis by telephone again. *Id*. at 136.

8. On May 6, 1998 Mrs. T. met with Curtis at her request to discuss a referral to special education for C. T. Hearing Tr. at 488; Hearing Dec. at 301. Curtis testified that Mrs. T. initially asked for the defendant to help defer the cost of the tutor for C. T.'s home schooling. Hearing Tr. at 49. They discussed what needed to be done if C. T. had not been identified as a special education student while enrolled in M.S.A.D. 52. *Id*. Mrs. T. testified that Curtis told her that C. T. would have to be enrolled in the Lewiston public school system before he could be evaluated for special-education services. *Id*. at 492. Curtis testified that he "advised" Mr. and Mrs. T. to register C. T. in the public school system. *Id*. at 54. Mr. T. testified that the superintendent of the Lewiston public schools also told him, during a telephone conversation in August 1998, that C. T. had to be enrolled in the system before he could be evaluated. *Id*. at 271-72.

9. On May 8, 1998 Mrs. T. provided copies of C. T.'s evaluations, medical records and school records to Curtis along with a letter stating that she would be sending an update from Jensen and a year-end assessment from C. T.'s tutor. Administrative Record at 275. The letter also requests a "meeting" at the school to which C. T. would be assigned. *Id*. Curtis responded by letter dated May 15, 1998, informing Mr. and Mrs. T. that the information they had provided showed that C. T. had not

been identified for special education services at M.S.A.D. 52, so that referral for evaluation would be necessary, and enclosing a referral form to be completed and returned in order to initiate that process. *Id*. at 273. Mr. and Mrs. T. chose to have the tutor fill out the referral form after she had completed the academic year with C. T., Hearing Tr. at 490, and, according to Mrs. T., she hand-delivered the completed referral form to Curtis's office in early July, *id*. at 491. The form bears Curtis's signature and a July 28, 1998 date, Administrative Record at 132, and Curtis testified that he received it on that date, Hearing Tr. at 26.

10. Mr. T. contacted Curtis and the superintendent by telephone in August 1998 "to get [the evaluation] moving." *Id*. at 275-76. During his conversation with the superintendent, Mr. T. asked whether C. T. could be placed at Pettingill School rather than Martel School because Pettingill offered special education services. *Id*. at 273. Mr. T. testified that the superintendent told him that there was "no way" this could be done. *Id*.

11. Mr. and Mrs. T. registered C. T. with the Lewiston school system on August 24, 1998. Administrative Record at 272. A Pupil Evaluation Team ("PET") meeting was held for C. T. at the Martel School on August 31, 1998, the first day on which teachers and staff reported for work for the school year. Hearing Tr. at 26-27; Administrative Record at 266-67. At this meeting, Mrs. T. submitted a signed acknowledgement of her receipt of the defendant's special education handbook. Administrative Record at 268. Mr. T. read the handbook in 1997 when he received it from Curtis. Hearing Tr. at 259. Attending the PET meeting were C. T., his parents, C. T.'s fifth grade teacher, the resource room teacher for the school, the principal and the special education coordinator for the school. Administrative Record at 266. The parents presented their reasons for referring C. T. for evaluation of his special education needs. *Id*. After reviewing C. T.'s school records and the information provided by the parents, the team decided that no special education services were

appropriate at that time, that C. T. would be observed in a regular classroom setting for a time, and that the PET would reconvene on October 15, 1998. *Id*. at 266-67; Hearing Tr. at 66. Mr. T. did not agree with the decision not to begin evaluation of C. T. immediately but felt that he "had no other choice at the time." Hearing Tr. at 281.

12. The special education coordinator for the Martel School testified that the decision to observe C. T. in a regular classroom setting without beginning the evaluation was based on the facts that C. T. "was a new student coming to us," had no history of special education, and had average grades. *Id.* at 107. The representatives of the school at the August 31 meeting believed that the parents were satisfied with this decision. *Id*. at 55-56, 108.

13. Mr. T. testified that around September 21, 1998 he asked C. T.'s teacher to stop giving C. T. homework because it took him so long to do and caused him so much anxiety. *Id*. at 286-88. She agreed, but after about two weeks told C. T. that he would have to begin doing homework again. *Id.* at 288-89. The teacher testified that this arrangement was requested in November, and that she agreed at that time to reduce C. T.'s workload. *Id*. at 82.

14. A second PET meeting was held on October 15, 1998. Administrative Record at 260. At this meeting, the parents again requested evaluation, Hearing Tr. at 304, and told the other participants that homework was causing physical concerns for C. T. at home, Administrative Record at 260. The PET agreed to obtain certain evaluations and the parents were given a consent form which Mr. T. signed that day. *Id*. at 260-62. C.T.'s grades during the first quarter of the school year were Bs and Cs. *Id*. at 207. His grades began to deteriorate during the first part of the second quarter, Hearing Tr. at 81; Administrative Record at 295, and, although there was some improvement in the second half of the quarter, Hearing Tr. at 82-83, C. T. received Ds and failing grades for that quarter, Administrative Record at 207. Another PET meeting was scheduled for December 17, 1998. *Id*. at 253.

15. Between December 8 and December 16, 1998 C.T. was tested for written language ability, *id*. at 236-37; evaluated by the school psychologist, *id*. at 238-45; evaluated by the special education coordinator for Martel School, *id*. at 246-49; and evaluated by a speech therapist, *id*. at 250-51.

16. The hearing officer summarized the psychologist's findings as follows:

> Results of the W[echsler] I[intelligence] S[cale for] C[hildren]-III show the student's overall intellectual ability is within the Average range with a Full Scale score of 104. Scores on all subtests were in the average range or better. She found minimal evidence of a processing deficit. These results were consistent with the findings of previous psychological evaluations.
>
> She determined that the student displayed relative weakness in attention to verbal stimuli and short-term auditory memory. She found that performance anxiety was a contributing factor. Issues regarding self-esteem and appropriate strategies to deal with life situations were evident from personality assessment. "He can feel that he lacks control over his environment and his sense of dyscontrol [sic] can result in heightened levels of anxiety. [He] does not present with significant levels of depression . . ." He "can become unduly upset due to his limited strategies to assist him when he feels challenged or in conflict." The student's teacher reported "very significant problems in the area of social problems while, [sic] his inattention fell at the significant level" on behavior rating scales.
>
> The evaluator summarized her report by stating that the students [sic] "will benefit from a highly structured, consistent educational environment with reduced assignments" and "modeling of effective coping strategies such as relaxation and cognitive behavioral techniques to assist with anxiety management." She also noted that the student "may need individualized instruction in written language and organizing his written language." The student "will require the opportunity to improve his social and emotional functioning through activities which increase his self-esteem, social skills and compensatory strategies."

Administrative Record at 302-03.

17. C. T.'s scores on the written language test fell in the "below average" and "poor" range. *Id*. at 236-37. The hearing officer summarized the report of the special education coordinator, based on the results of two diagnostic tests, as follows:

> [T]he evaluator found the student "scored within the average range of performance in Reading and Knowledge areas. He scored below average in math [by age, but within the average range by grade] and [was] moderately delayed in the Written Language domain." The evaluator noted that he required frequent breaks, was distracted by environmental noises, and required slower auditory presentation. He "demonstrated poor mechanics in his writing and below grade expectations in spelling."

Id. at 303; *see also id*. at 246-49. The speech therapist found delayed phonological processing skills that required remediation and suggested strategies to deal with this difficulty. *Id*. at 250-51.

18. At the December 17, 1998 meeting the PET team completed a learning disabilities evaluation report, *id*. at 228-29, and determined that C. T. did not meet the criteria to be classified as having a learning disability but was eligible for special education services under the category of "other health impaired," *id*. at 229. An IEP was written that provided 120 minutes per week in the resource room with the special education teacher, listed classroom modifications, and stated one annual goal ("[C.T.] will successfully maintain passing grades in all subject areas") with two instructional objectives. *Id*. at 230-34. Mrs. T. signed a "Consent for Placement" in the resource room; this form includes the following statement: "If you agree with the recommendation, we ask that you sign the consent form above. If you disagree, procedural safeguards indicating the next steps to follow are enclosed with this notice." *Id*. at 224-25. A handwritten entry on this form reads: "The P.E.T. is not totally sure if this level of services are [sic] enough — we will meet again soon." *Id*. at 225.

19. The next PET meeting was held on January 14, 1999. *Id*. at 212. At this meeting Mr. and Mrs. T. presented a written "alternative IEP," Plaintiffs' Proposed Findings of Fact (Docket No. 25) ¶ 85; Administrative Record at 212-13; & Page 212A, attached to Motion to Supplement Administrative Record (Docket No. 11), which set forth what they felt was best for C. T., Hearing Tr. at 324. The minutes of the meeting note that the parents "would like a more restrictive program and they are

concerned about losing more time for" C. T., that C. T. "will be referred to system P.E.T.," and that "[a] new I.E.P. was written by consensus at the meeting. Chase will have a resource room program for eight hours per week for reading, spelling, written language, and support. A modification sheet was attached to the I.E.P." Administrative Record at 212. The IEP that resulted from this meeting is found in the administrative record at pages 215-20. The special education program at Pettingill School was also discussed at this meeting, Hearing Tr. at 329-30, and after the meeting the parents participated in a "staffing," a meeting between staff of the Martel and Pettingill schools to discuss the possibility of moving C. T. into the Pettingill special education program, *id*. at 31-32, and visited Pettingill on a second occasion, *id*. at 333-39. Pettingill had two self-contained special education classrooms — one for fourth and fifth grade students and one for fifth and sixth grade students. *Id*. at 335. C. T. was being considered for the fifth and sixth grade room. *Id*. at 334. Mr. T. was told that one of these classrooms was currently at the maximum enrollment allowed by state regulation; he testified that this was the fifth and sixth grade room, *id*. at 335, although his notes from the staffing meeting indicate that it was the fourth and fifth grade room, Administrative Record at 114. The parents were told that, if a decision was made to move C. T. to the classroom that was at maximum enrollment, a waiver could be sought from the state or extra staff could be hired. Hearing Tr. at 139. There was frequent movement of students in and out of such classrooms, so that the fact that a classroom was at maximum enrollment one day did not mean that it would be at that level the next day. *Id*. at 58, 139. Curtis, the special education director for the Lewiston school system, was not bothered by the fact that the classroom was at maximum enrollment at that time; the system often had special education classes that reached maximum enrollment, and in addition to the frequent changes in enrollment, he had had "considerable success" in requesting temporary waivers from the state. *Id*. at 58.

20. On February 1, 1999 C. T. was evaluated by Ellen Brunelle, an educational consultant, who also prepared on that day a "personalized learning plan" for C. T. to be implemented at Southern Maine Learning Center, a private school founded and headed by the therapist who was treating C. T. Administrative Record at 103-11; Hearing Tr. at 355, 406. A letter accepting C. T. as a student at the Southern Maine Learning Center dated February 3, 1999 is signed by Brunelle as "Director of Instruction." Administrative Record at 102.

21. A "system PET" is held when there is a possibility that a student may be moved from one school to another in the Lewiston public schools. Hearing Tr. at 29. The system PET for C. T. was held on February 5, 1999. Administrative Record at 194. The hearing officer made the following summary of this meeting, which is not disputed by the plaintiffs:

> Attending were: the Director of Special Education [for Lewiston],[1] the student's special education teacher, the student's regular education teacher, the principal of the neighborhood elementary school, the special education coordinator of that school, the principal of the elementary school housing a district-wide self-contained special education program, the special education coordinator of that school, a special education teacher from that school, the psychologist who had recently completed an evaluation of the student, both parents, two advocates from the Department of Mental Health, Mental Retardation and Substance Abuse Services, and a legal advocate [retained by the parents]. In addition, the student's private psychotherapist attended via speakerphone. After a lengthy discussion of the student's needs, and the parents' concerns, the PET made the following determinations: a recommendation for placement in a self-contained class in the district, an occupational therapy evaluation, and special transportation. Implementation of the placement was scheduled to begin "upon parent agreement." Consensus was not reached regarding this placement.

[1] The plaintiffs state that Curtis "was notably absent from the other PETs." Plaintiffs' Proposed Findings of Fact ¶ 101; Plaintiffs' Brief (Docket No. 24) at 11. It is unclear what weight, if any, the plaintiffs contend that the court should give to this fact. However, in a school system in which 750 students have been identified as having special education needs, Hearing Tr. at 38, it would be physically impossible for the system's director of special education to attend every PET for every student.

Administrative Record at 304. The parents proposed that C. T. be placed in a private day school like the Southern Maine Learning Center, *id*. at 195, but the school representatives rejected this alternative as not providing the least restrictive environment appropriate for C. T., *id*. at 192.

22. The defendant drafted an IEP that described the proposed placement of C. T. in the self-contained classroom at Pettingill and included nine pages of goals and objectives. *Id*. at 197-206 & 205A, attached to Motion to Supplement Administrative Record. This draft, along with a Notice of Proposed Change of Program, a consent form for occupational therapy evaluation, and a copy of the minutes of the February 5 PET meeting were sent to the plaintiffs on February 10, 1999. Administrative Record at 191B, 192A-C (both attached to Motion to Supplement Administrative Record), & 192-206.

23. During the following week, C. T. called his father at work to report that he had been kicked and hit by another student and was in the school principal's office.[2] Hearing Tr. at 344-45. Mr. T. went to the school and took C. T. home. *Id*. at 345. By letter dated February 8, 1999 the plaintiffs informed the defendant that C. T. would "not be continuing as a fifth grade student at Martel school." Administrative Record at 191A, attached to Motion to Supplement Administrative Record. The letter also states: "The failure to develop an appropriate Individual Education Program

[2] The plaintiffs state that this incident occurred on February 7, 1999, Plaintiffs' Proposed Findings of Fact ¶ 110, but that day was a Sunday.

for [C.T.] and the proposed placement is not appropriate to his needs. [sic] Southern Maine Learning Center current can meet [C.T.'s] needs, and is appropriate." *Id.* The school received this letter on February 10, 1999. *Id*. at 191B. His parents then enrolled C. T. at the Southern Maine Learning Center. Hearing Tr. at 346-47.

24. By letter dated March 12, 1999 the defendant requested a due process hearing. Administrative Record at 1. A hearing officer was appointed on March 19, 1999. *Id*. at 3. Attorneys for the parties held a conference call with the hearing officer on March 30, 1999, *id*. at 4A; a prehearing conference was held by telephone on April 7, 1999, *id*. at 13; and the hearing was held on April 13 and April 28, 1999, Hearing Tr. The parties submitted post-hearing memoranda on May 10, 1999, Administrative Record at 19-77, and the hearing officer issued her undated decision, *id*. at 298-313, at some time shortly before June 2, 1999, *id*. at 314.

25. The hearing officer concluded, *inter alia*, that Mr. T.'s May 1997 conversation with Curtis did not constitute a referral of C. T. for special education services; that the parents first made a referral on July 28, 1998 when they returned the referral form; that the August 31, 1998 PET meeting failed to comply with required procedure by deferring action on the parents' request for evaluation; that the evaluation that followed the October 15, 1998 PET meeting complied with all procedural requirements; that the draft IEP presented to the parents after the February 5, 1999 PET meeting was not developed outside the PET process; that the school system had not predetermined placement for C. T. before the February 5, 1999 PET meeting; that there was no statutory or regulatory violation due to the fact that the Pettingill program offered to the parents at the February 5, 1999 meeting was on that day at its maximum enrollment; that the initial IEP and the January 1999 modification did not address all areas of C.T.'s disability; that the IEP proposed after the February 5, 1999 meeting did address all of C.T.'s identified needs; that the Southern Maine Learning Center program is not appropriate for C.

T. under the applicable statutory criteria; and that the identified failures by the defendant, coupled with the parents' failure to invoke their due process remedies at the time, justified an award to the parents of half of the costs of C.T.'s attendance at the Southern Maine Learning Center through June 14, 1999. *Id*. at 307-13. The decision also orders that the PET convene "before the beginning of the 1999-2000 school year to review and revise as necessary the IEP proposed by the school that places the student in the self-contained classroom at the Pettingill School." *Id*. at 313.

26. The parents filed this action, appealing from the hearing officer's decision pursuant to 20 U.S.C. § 1415, Complaint (Docket No. 1) ¶ 2, on June 30, 1999. Docket. The defendant filed an answer and counterclaim, in which it seeks reversal of the monetary award, Answer/Counterclaim at 12, on July 21, 1999. Docket No. 4. The transcript of the due process hearing (Docket No. 13) was not filed until November 10, 1999, and further delay resulted from a change in counsel for the plaintiffs. Briefing was concluded on June 23, 2000.

II. Proposed Conclusions of Law

A. Applicable Legal Standards

1. The IDEA provides, in relevant part, that a state, like Maine, that receives federal financial assistance for its public schools, must ensure that:

> [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.
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> * * *
>
> An individualized education program . . . is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.
>
> * * *
>
> To the maximum extent appropriate, children with disabilities, including children in public or private institutions . . ., are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that

> education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> * * *
>
> Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

20 U.S.C. § 1412(a)(1), (4), (5) & (6). The IDEA defines an IEP in relevant part as follows:

> The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes —
>
> (i) a statement of the child's present levels of educational performance including —
>
> (I) how the child's disability affects the child's involvement and progress in the general curriculum . . .
>
> (ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to —
>
> (I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and
>
> (II) meeting each of the child's other educational needs that result from the child's disability;
>
> (iii) a statement of the special education and related services and supplementary aids and services to be provided to the child . . . and a statement of the program modifications or supports for school personnel that will be provided for the child . . . ;
>
> (iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class . . .; [and]
>
> * * *
>
> (vi) the projected date for the beginning of the services and modifications . . ., and the anticipated frequency, location, and duration of those services and modifications.

20 U.S.C. § 1414(d)(1)(A).

Finally, the IDEA imposes certain procedural requirements. The state must establish procedures that include

> an opportunity for the parents of a child with a disability . . . to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public

> education to such child, and to obtain an independent educational evaluation of the child . . ., [and]
>
> an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

20 U.S.C. § 1415(b)(1) & (6). When such a complaint is presented, the parents involved "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency." *Id*. § 1415(f)(1). Any party aggrieved by the findings and decision made in a due process hearing has the right to bring a civil action in state or federal district court. *Id*. § 1415(i)(2)(A). That court shall receive the records of the administrative proceeding, hear additional evidence at the request of a party, and base its decision on the preponderance of the evidence. *Id*. § 1415(i)(2)(B).

2. Regulations implementing the IDEA add further requirements, set forth in relevant part below:

> The IEP for each child must include —
>
> * * *
>
> (2) A statement of annual goals, including short-term instructional objectives; [and]
>
> * * *
>
> (5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

34 C.F.R. § 300.346(a).

The state educational agency must ensure that each child with a disability "is educated in the school that he or she would attend if nondisabled," unless his IEP requires some other arrangement. 34 C.F.R. § 300.552(c). An "appropriate education" is defined as

> [t]he provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33(b)(1).

3. Section 504 of the Rehabilitation Act of 1973 provides, in relevant part:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

4. In order to obtain federal financial assistance for public education, a state must demonstrate to the satisfaction of the federal Department of Education that it has in effect policies and procedures that ensure that

> [a]ll children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a) & (a)(3)(A). The Maine Department of Education has promulgated regulations governing the provision of special education services, including this "child find" requirement.

> Each school unit shall maintain procedures to ensure that all students between the ages of 3 and 20 years, including state wards, state agency clients and institutional residents who reside within its geographic jurisdiction and who are in need of special education and supportive assistance, are identified, located and evaluated. These procedures shall include a practical method of documenting which students with disabilities are currently receiving needed special education and supportive services, and identifying any unmet needs.

Maine Department of Education, Special Education Regulations, Chapter 101 (effective October 31, 1995)[3] (copy attached to Plaintiffs' Brief), § 7.10. In general, the regulations require that all students be screened for possible special education needs upon first enrollment of the student in a public

[3] All references to the state regulations in these recommended findings of fact and conclusions of law are to the 1995 version, which was in effect at all relevant times.

school system, and that students who attend private schools "shall be offered the opportunity for screening at public expense." *Id*. §§ 7.1-7.2.

5. The Supreme Court first interpreted the Education of the Handicapped Act, popularly referred to now as the IDEA, in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In that case, the Court held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items [included in 20 U.S.C. § 1401(18)] are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189. The "other items" included in section 1401(18) are requirements that the education is provided at public expense and under public supervision, meets the standards of the state education agency, and is provided in accordance with the requirements of section 1414(a)(5).[4] The instruction and services provided by the state must "approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id*. at 203.

The court also held that

> the importance Congress attached to [the elaborate and highly specific] procedural safeguards [embodied in 20 U.S.C. § 1415] cannot be gainsaid. It seems to use no exaggeration to say the Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.
>
> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review . . . . The fact that § 1415(e) requires

[4] Section 1414(a)(5) was repealed effective July 1, 1998. It required educational units to establish and maintain IEPs for children with disabilities. This requirement is now found at 20 U.S.C. § 1412(a)(4).

> that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Id. at 205-06. The Court directs a "twofold inquiry" for reviewing courts:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07. It is not the goal of the Act to maximize the potential of each handicapped child but rather to provide him or her with access to a free public education that will provide an educational benefit. *Id*. at 200-01.

6. In this case, "[t]he court's principal function is one of involved oversight." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990).

> The Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial, and obligates the court of first resort to assess the merits and make an independent ruling based on the preponderance of the evidence. Nevertheless, the district court's task is something short of a complete de novo review.
>
> The required perscrutation must, at one and the same time, be thorough yet deferential, recognizing the expertise of the administrative agency, considering the agency's findings carefully and endeavoring to respond to the hearing officer's resolution of each material issue. Jurists are not trained, practicing educators. Thus, the statutory scheme binds trial courts to give due weight to the state agency's decision in order to prevent judges from imposing their view of preferable educational methods upon the States.

Id. (citations and internal punctuation omitted). When the court pursues an inquiry under 20 U.S.C. § 1415(e)(2),

> the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the

> IEP was promulgated . . . . We think it well that courts have exhibited an understandable reluctance to overturn a state education agency's judgment calls in such delicate areas — at least where it can be shown that "the IEP proposed by the school district is based upon an accepted, proven methodology." . . . Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.

Id. at 992 (citations omitted).

7. The party allegedly aggrieved, the plaintiffs with respect to the complaint and the defendant with respect to its counterclaim, must carry the burden of proving (in the plaintiffs' case) that the claimed procedural or substantive shortcomings of the IEP caused harm, *id*. at 995, or (in the defendant's case) that the hearing officer's award was contrary to law or without factual support.

8. Evidence that was not before the hearing officer at the due process hearing "should be used by the courts only in assessing the reasonableness of the [defendant's] initial decisions regarding a particular IEP." *Susan N. v. Wilson Sch. Dist*., 70 F.3d 751, 762 (3d Cir. 1995). "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993).

9. Violation of state procedural requirements may constitute violation of the IDEA. *Murphy v. Timberland Reg'l Sch. Dist*., 22 F.3d 1186, 1195-96 (1st Cir. 1994).

10. The IDEA requires exhaustion of administrative remedies before claims may be raised in court. *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985) (decided under statutory predecessor of IDEA); *Logue v. Shawnee Mission Pub. Sch. Dist. No. 512*, 959 F. Supp. 1338, 1349 (D. Kan. 1997) (same under IDEA).

B. The Plaintiffs' Claims

11. C. T.'s substantive rights created by the Rehabilitation Act, specifically 29 U.S.C. § 794, the basis of Count II of the complaint, "derive wholly from the substantive requirements of" the IDEA; plaintiffs may not use the general remedial provisions of the Rehabilitation Act to expand the scope of the remedies available under the IDEA. *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 923 (D. Me. 1990) (referring to the IDEA as "Education of All Handicapped Children Act," an earlier popular name). Plaintiffs may use the Rehabilitation Act in cases like this "only to pursue those remedies available under" the IDEA. *Id.* In addition, the plaintiffs' attenuated discussion of Count II in their brief does not suggest any reason to treat this claim differently or separately from their claim under the IDEA. Plaintiffs' Brief at 39-40. Accordingly, I will not consider the claim made in Count II separately from the IDEA claim raised in Count I.

1. "Child Find" Requirements.

12. The plaintiffs contend that the defendant violated the "child find" requirements of 34 C.F.R. § 300.128 and sections 7.1 to 7.10 of Chapter 101 of the Special Education Regulations promulgated by the Maine Department of Education ("State Regs.") "by failing to identify, locate, and evaluate C. T. while he was living in the Lewiston [sic] during the years 1994-1998," Plaintiffs' Brief at 1, and again after Mr. T. spoke with Curtis in May 1997, *id.* The defendant responds that this claim was not presented to the hearing officer and accordingly has been waived. Defendant's Brief at 10. In order to be preserved for judicial review, issues must first be presented to the administrative hearing officer. *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985). The federal "child find" requirement is actually found at 34 C.F.R. § 300.125 and requires a state to ensure that "[a]ll children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and

related services, are identified, located, and evaluated." Section 7.10 of the state regulations contains similar language.

13. This claim was raised by the plaintiffs in the administrative proceeding. It was raised in their pre-hearing memorandum, Administrative Record at 9, and it was argued in their post-hearing memorandum, *id*. at 72-73. The hearing officer quoted the "child find" requirement of the IDEA, *id.* at 306, although she did not address in her decision the claim that the defendant violated this statutory and regulatory obligation when it failed to "find" C. T. while he was enrolled in parochial school. In any event, the plaintiffs seem to contend, without citation to supporting authority, that a public school system has an obligation under the IDEA to seek out all children who reside within its geographical boundaries and screen them for learning disabilities, whether or not any request is made for evaluation or services. The specter of unwarranted intrusion into family privacy raised by this view of the statute is sufficient explanation for the lack of authority in the case law to support it. The defendant had no reason to know of C. T.'s existence when his parents moved to Lewiston, apparently in 1994, and enrolled him in the parochial school. Curtis, the defendant's director of special education, testified that the defendant advertised the fact that special education services were available, employed a staff member to contact all private schools and provide training about the process of referring students for special education services and had a good working relationship with the parochial school where C. T. was enrolled, such that the school had in the past referred students enrolled there to the defendant for evaluation and possible provision of special education services. Hearing Tr. at 22-23, 47. The plaintiffs are not entitled to recover based on any alleged failure of the defendant to "find" C. T. between 1994 and 1997. *See W. B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995) ("child find" statutes and regulations require school officials to identify and evaluate children "who are suspected of having

a qualifying disability" within a reasonable time after they are "on notice of behavior that is likely to indicate a disability").

14. The plaintiffs next argue that Mr. T.'s conversation with Curtis in May 1997 both triggered the defendant's "child find" obligations and was a referral, requiring the defendant to begin the PET process. Plaintiffs' Brief at 4, 22-25. They rely heavily on a letter sent to Mr. T. by Curtis dated May 12, 1997 which states, in its entirety: "Enclosed is the 'Parent Handbook' we spoke about in our 5-8-97 telephone conversation. Please feel free to call me about any questions this information may raise for you. At your request, my office will begin the referral process with [the parochial school] in order to determine special education eligibility for your son [C. T.]." Administrative Record at 137. While it is possible to interpret the last sentence in this letter to mean that a referral had been made, Curtis testified that he meant that when and if Mr. T. requested the parochial school to make a referral, the special education office of the Lewiston public schools would begin the process. Hearing Tr. at 46-48. Curtis testified that he would not have contacted the parochial school himself as a result of his conversation with Mr. T.; he simply provided Mr. T. with the information that would allow Mr. T. to start the process. *Id*. at 45-46. The hearing officer found that "[e]vidence does not support the parent's [sic] contention that the school failed to act on a referral made by them in 1997." Administrative Record at 306. She noted that "there was no further contact by the parents that year.[5] It is not reasonable to assume that the parents were waiting for the school to follow up on this referral for a full calendar year." *Id.*

> No referral had been made by the parochial school on behalf of this student in the three years before the parents' 1997 phone call, even though the parochial school often made such referrals to the district. Additionally, the

[5] Mr. T. testified that he called "the school" in October 1997. Hearing Tr. at 263-64. The plaintiffs characterize this as a "follow-up" on his first telephone call "because of problems they were experiencing with home schooling," Plaintiffs' Proposed Findings of Fact ¶ 20; Plaintiffs' Brief at 4, but neither Mr. T.'s testimony nor the message taken by an unidentified employee of the defendant, Administrative Record at 136, support this characterization. The call was not returned. Hearing Tr. at 263-64.

> tutor hired by the parents during the student's fourth grade year — a person who had previous experience with the district's special education services, made no referral. Absent a follow-up from the parent during the 1997-98 school year, there was no reason for the school to believe that the student was a potential candidate for special education referral.

Id. Giving due weight to the hearing officer's findings, the preponderance of the evidence supports the hearing officer's conclusion on this point. To the extent that the hearing officer did not mention the "child find" requirements in reaching her conclusion on this point, the result is the same.

2. The May 1998 Contact — Procedural Issues.

15. The plaintiffs assert that Mrs. T.'s May 1998 meeting with Curtis constituted a referral of C. T. under the IDEA, thereby triggering certain time limits set by the state regulations. Plaintiffs' Brief at 5, 26. Specifically, they allege that the defendant violated the following state regulations: sections 8.20 (third paragraph, requiring the school district to provide the parent with a form upon which the parent may give consent for initial evaluation within 15 school days of the referral, and beginning the 45-school-day period in which the evaluation must be completed on the date of receipt of the written parental consent); 10.3(A), requiring written notice to the parents at least seven days prior to the school district's "proposal to initiate or change the identification, evaluation and/or educational program or placement of the student or refusal to initiate or change the identification, evaluation or educational placement of the student"); and 10.3(B) (specifying the content of the notice required by section 10.3(A)). They also allege that the defendant "failed in its obligation to provide parents with accurate information regarding their procedural rights" when Curtis and Levesque informed them that C. T. would have to be enrolled in the Lewiston public school system in order to be evaluated for special education services, Plaintiffs' Brief at 26, although they cite no authority for this alleged obligation.

16. Curtis testified that Mrs. T. initially asked him whether the defendant could help defer the cost of tutoring for C. T. at home. Hearing Tr. at 49. It was in this context, he testified, that a discussion of the question whether C. T. had been identified as a special education student while in kindergarten and first grade in Greene, Maine, first arose. *Id*. He did not send Mrs. T. the form to initiate a referral until he determined from the records she provided that C. T. had not been so identified. *Id.* at 50. His letter dated May 15, 1998 to Mr. and Mrs. T. states, in relevant part, "We will schedule mutually convenient date [sic] for a PET at Martel School as soon as the referral form is received." Administrative Record at 273. The defendant does not address this issue in its brief, but does contend that the referral form was not received until July 28, 1998. Defendant's Memorandum of Law on Plaintiff's Claims and Defendant's Counterclaim ("Defendant's Brief") (Docket No. 27) at 17; Hearing Tr. at 26; Administrative Record at 132 (name and date written in upper right-hand corner). Mrs. T. testified that she delivered the form to Curtis, who was not in, in "[e]arly July." Hearing Tr. at 491. The hearing officer found that "[t]he completed referral was received by the district on July 28," Administrative Record at 301, and that the August 31 PET meeting "constitutes a timely response to the referral. There is no finding that the school failed to process the referral for special education in a timely manner," *id*. at 307. Necessarily implied in the hearing officer's conclusion is a finding that Mrs. T.'s conversation with Curtis in early May 1998 did not constitute a referral. The hearing officer's finding concerning the date the defendant received the referral form is based on her resolution of the dispute in the testimony of Mrs. T. and Curtis based on her evaluation of the witnesses' credibility. The plaintiffs offer no persuasive reason why this court should not defer to that determination. *See Board of Educ. Of Montgomery County v. Hunter*, 84 F.Supp.2d 702, 705-06 (D.Md. 2000).

17. Nothing in the state regulations cited by the plaintiffs prevents a school district from requiring that a referral — the act which triggers the procedural requirements upon which the plaintiffs rely — be made in writing. The hearing officer's conclusion that only return of the written referral form constitutes a referral under the applicable state regulations is not unreasonable. The plaintiffs do not identify any provision of the IDEA that is allegedly violated by such an interpretation. The plaintiffs waived the notice requirements of section 10.3 of the state regulations in connection with the August 31, 1998 PET meeting, Administrative Record at 269, which was the initiation of the defendant's evaluation of C. T., and there is no sense in which the defendant's actions after Mrs. T.'s meeting with Curtis in early May of that year can reasonably be construed to constitute a refusal to initiate C. T.'s evaluation or to provide him with a free appropriate public education. There was no violation of section 10.3 of the state regulations regardless of the date of the referral. Nor was there any violation of section 8.20 of the regulations. Finally, the plaintiffs' failure to develop any argument concerning the defendant's alleged obligation to provide them with accurate information concerning the need to enroll C. T. in the public school system before he could be referred for evaluation for possible special education services — although it is not immediately apparent how this issue involves the parents' procedural rights, Plaintiffs' Brief at 26 — means that this court will not consider the issue. *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990) (lack of developed argument means issue is waived).

3. Other Procedural Issues[6]

[6] Some of the plaintiffs' specific allegations concerning subsequent events list as procedural alleged violations that are more appropriately considered as substantive, and some merely restate earlier allegations. I do not consider those allegations here, but rather will address those that are substantive and the plaintiffs' allegations concerning the matters that are the subject of the defendant's counterclaim in later subsections of this document.

18. The plaintiffs next contend that the defendant violated section 9.8 of the state regulations because no IEP was in place for C. T. when the school year began on September 1, 1998. Plaintiffs' Brief at 27. This issue was not presented to the hearing officer and accordingly has been waived. Even if that were not the case, the cited regulation requires that "[a]ll identified students with disabilities shall have a current Individualized Education Program in effect at the start of each school year." Until C. T. was evaluated and determined to be eligible for special education services, a process that could only have begun on August 31 at the earliest, he was not identified as a student with a disability, and accordingly the cited regulation was inapplicable.

19. The plaintiffs assert that the defendant violated sections 8.20 and 10.3(A) of the state regulations by failing to provide them with a consent form for evaluation within 15 days of the August 31 meeting and by failing to notify them of its refusal to evaluate C. T. or otherwise to provide him with a free appropriate public education. Again, the consent-form claim was not presented to the hearing officer and must be deemed waived. Even if that were not the case, both Curtis and Pare testified that the plaintiffs appeared to agree with the decision to defer evaluation of C. T. Hearing Tr. at 55-56, 108. Given this belief, the defendant had no reason to provide the plaintiffs with a consent form at that time, because no evaluation would take place before the next PET meeting, at the earliest. With respect to the second claim, a decision to defer evaluation for six weeks cannot reasonably be construed as a refusal to provide evaluation or a free appropriate public education, and the plaintiffs cite no authority to the contrary. The plaintiffs had already been provided with notice, in the parents' handbook, of their right to seek a due process hearing if they disagreed with the decision to defer evaluation of C. T.

20. Moving on to the October 15, 1998 PET meeting, the plaintiffs argue that the defendant violated section 8.9 of the state regulations by failing to include in the minutes of the meeting any

record of their statements concerning problems they perceived C. T. was undergoing at school and the accommodations or modifications that they suggested for C. T. at that meeting. Plaintiffs' Brief at 27. Again, there is no indication in the record that this claim was ever presented to the hearing officer and it therefore must be deemed to be waived. Even if that were not the case, the cited regulation is not as specific as the plaintiffs suggest. It simply provides that "[t]he minutes shall include the purpose of the meeting, the name and title of each member and participant, a summary of the discussions and the determinations of the P.E.T." While a more thorough record would certainly be preferable, *see* Administrative Record at 260, the minutes do not violate the regulation.

21. The plaintiffs next assert that the defendant violated section 9.8 of the state regulations by failing to implement an IEP within 30 days of the October 15 PET meeting. Assuming that this allegation as well was properly presented to the hearing officer, in the absence of any direct evidence of this fact, the hearing officer held that, after the October meeting, "the district complied with required procedures in their evaluation of the student." *Id*. at 308. The cited regulation only requires implementation of an IEP within 30 days after a PET identifies the student as one with a disability in need of special education and supportive services, and the October 15 meeting did not identify C. T. as such a student. That identification occurred at the December 17 PET meeting, after C. T. had been tested and evaluated, in accordance with sections 8.1, 8.3 and 8.20 of the state regulations. The hearing officer's conclusion, if applicable to this claim, was correct. Even if the hearing officer did not address this claim and it has not been waived, there is no procedural violation.

22. With respect to the evaluations, the plaintiffs contend that they were procedurally flawed because they "were conducted under rushed circumstances, failing to take into consideration C. T.'s anxiety issues and not permitting the parents to have meaningful participation in the process." Plaintiffs' Brief at 28. The plaintiffs cite no statute or regulation that was allegedly violated in

connection with this claim, which was not brought to the attention of the hearing officer and must therefore be deemed to have been waived as an issue or claim. Even if that were not the case, the plaintiffs' failure to identify any legally-required procedure alleged to have been violated by the conduct at issue means that the court cannot address this claim.

23. The plaintiffs' procedural claims concerning the December 17, 1998 PET meeting begin with an assertion that the defendant violated a subsection of section 8.5 of the state regulations ("Parents shall be notified and given the opportunity to review and obtain copies of evaluation summaries or other reports to be discussed at the P.E.T.") because the tests were not completed until the day before the PET meeting. Plaintiffs' Brief at 28. This issue was not presented to the hearing officer and has thus been waived.

24. The plaintiffs next contend that the defendant violated the last paragraph of section 9.3 of the state regulations and 34 C.F.R. § 300.345(f) by failing to provide them with "significant portions" of the IEP developed at the December 17 meeting. *Id*. They raise the same claim concerning the IEP that resulted from the January 14, 1999 PET meeting. *Id*. at 29. Specifically, Mr. T. testified that he never received the fourth and fifth pages of the five-page December IEP, Hearing Tr. at 319-20, and that he never received the fourth through sixth pages of the six-page January IEP, *id*. at 329.[7] The state regulation at issue provides: "A complete copy of the Individualized Education Program shall be provided to the parent within 21 school days of the P.E.T. meeting at which the Individualized Education Program was developed." State Reg. § 9.3. The federal regulation provides, in relevant part: "The public agency shall give the parent a copy of the child's IEP at no cost to the parent." 34 C.F.R. § 300.345(f). This issue was presented to the hearing officer, Administrative Record at 56-57,

[7] The plaintiffs also claim that they "were never provided" with a disability evaluation chart that appears in the administrative record at pages 228-29. Plaintiffs' Proposed Findings of Fact ¶ 78(c). However, the testimony cited in that proposed finding, Hearing Tr. at 318-19, does not support this assertion and the signatures of both plaintiffs appear on the document, Administrative Record at 229. (continued…)

but was not addressed in her decision. The defendant does not address this issue in its brief. This violation should be cause for concern to the defendant, because the portions of the IEPs never given to the parents included the statements of educational objectives and a behavior plan, both crucial elements of an IEP. While it is entirely possible that the parents were aware of these elements of the IEPs from the discussions at the PET meetings, that fact is not apparent from the minutes of the meetings and Mr. T. testified that he had never been aware of the behavior plan. Hearing Tr. at 320. While I conclude that this procedural violation did not deprive C. T. of educational benefit,[8] it could well have "seriously hampered the parent[s'] opportunity to participate in the formulation process" of those or any subsequent IEPs. *Roland M.*, 910 F.2d at 994. I have been unable to locate any reported case law in which a similar regulatory violation, standing alone, was found to be sufficient to warrant relief under the IDEA. *See, e.g., Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1444 (D. Ariz. 1997) (violation of IDEA when school district did not invite parent to multidisciplinary conference concerning child enrolled in private school after expulsion by school district, did not provide parent with copy of child's educational program and did not ask parent to approve program). On balance, I conclude that this violation, while serious, does not rise to that level. The deadline imposed by the state regulation for providing a copy of the December 17 IEP to the parents — twenty-one school days after the PET meeting — expired long after the January 14 IEP meeting at which the December IEP was modified. For the January IEP, the deadline expired long after the February 5, 1999 PET meeting at which the plaintiffs made clear that they wanted C. T. placed in the Southern Maine Learning Center rather than anywhere in the defendant school district and long after they removed him from the public schools on February 8, 1999. The proposed IEP that followed the

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The minutes of the December 17, 1998 PET meeting record that this report was discussed. *Id*. at 226.

[8] The hearing officer concluded that the services initiated by the December IEP did provide "some educational benefit." Administrative Record at 312. For the reasons discussed in the section of this recommended decision that follows, dealing with the plaintiffs' (continued…)

February meeting contained substantial changes from the January IEP. Under these circumstances, the parents' ability to participate in the development of C. T.'s IEPs was not sufficiently hampered to warrant relief under the IDEA. *See Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992) (violation of IDEA's procedural provisions not a violation of Act for which plaintiff may recover unless harm to student as a result of violation has been shown).

25. Moving on to the January 14, 1999 PET meeting, the plaintiffs next contend that the defendant "ignored" a "detailed written" IEP which they had written, thus violating 34 C.F.R. § 300.345. Plaintiffs' Brief at 29. Nothing in that federal regulation requires a PET to adopt an IEP as drafted by the students' parents. Indeed, such a requirement would essentially nullify the whole IDEA framework. The parents' written submission was attached to the PET minutes. Administrative Record at 212-14. No violation of the regulation is apparent.

26. The plaintiffs contend that the use of a copy of the first page of the December 17 IEP as the first page of the January IEP with the date changed by hand and the number of hours of resource room time "whited out" and increased is a violation of an unspecified procedural requirement that apparently provides some basis for relief under the IDEA. Plaintiffs' Brief at 29. This claim is not sufficiently specific to allow the court to address it, even if it had been presented to the hearing officer, which it was not.

27. The plaintiffs argue that the defendant violated 34 C.F.R. § 300.350 by failing to have self-contained special education programming at Martel School, the neighborhood school to which C. T. was initially assigned, after the fourth grade. Plaintiffs' Brief at 29. This claim was not presented to the hearing officer and thus has been waived, but it is important to note that nothing in the cited regulation, and certainly nothing in the IDEA, requires a school district to provide every form of

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substantive challenges to the IEPs, the record supports this conclusion.

special education that it may choose to provide at every school it operates. The cost of such a requirement would be so prohibitive that a district's only alternatives could well be to operate only a single school at which all of its special education services would be provided, closing all neighborhood schools, or to offer special education services only at sites outside the district, despite the IDEA's stated preference for educational services to be provided as near as possible to the child's home. 34 C.F.R. § 300.552(b)(3) & (c).

28. The plaintiffs' procedural complaints concerning the PET meeting held on February 5, 1999 begin with the assertion that the IEP sent to them after that meeting was developed without their consent or input and accordingly was invalid under sections 8.1 and 8.11 of the state regulations. Plaintiffs' Brief at 30. The IEP at issue was presented to the plaintiffs as a "proposed" IEP, Administrative Record at 81, and neither the statement in section 8.1 that the PET "includes the parent as an integral part of the team" nor the directive of section 8.11 that "P.E.T. decisions shall be made by consensus of the members present"[9] had been violated when the plaintiffs removed C. T. from the defendant school system on February 8. The hearing officer's decision addresses this claim in detail.

> The parents argue that the school developed the IEP for the proposed self-contained classroom outside of the PET process. The PET met on February 5 and discussed the possibility of placement for the self-contained program. Minutes of the meeting and a partial transcript of that meeting show that the meeting was lengthy and focused on the student's educational needs. . . . There was active participation by . . . the parents. The discussion clearly was about the student and what was required in the student's program. The team did not come to consensus on what the next step would be for the student. A recommendation was made for the student to be placed in the district's self-contained class for students with learning and attentional problems.
>
> School staff then left the meeting and drafted an IEP that was sent to the parent five days later. The letter transmitting the document makes clear that it is a proposed document for discussion at another team meeting, not a finished

[9] Section 8.11 also provides alternatives when consensus cannot be reached, including the provision that the PET chair "shall make a determination" in the event of deadlock, "subject to the parent's . . . right to a due process hearing."

> product. District staff testified that purpose [sic] was to provide a written offering of what the program in the self-contained classroom would encompass. The school did not violate procedures for involving parents in the development of an IEP. This document clearly reflects the discussion of the February meeting, and was not presented as final product. Schools may present written drafts of an IEP to parents, as long as those draft documents are subjected to a "full discussion with the child's parents, before the IEP is finalized." 34 CFR Part 300, App. A, Q. 32. The review and discussion of the document never occurred because the parents removed the student from school and enrolled him in a private school.

Administrative Record at 308-09. I find the hearing officer's evaluation of the evidence presented on this point at the due process hearing to be well reasoned and see no basis upon which to disagree with her conclusions. In addition, the February 5 IEP was not implemented and therefore could not have caused harm to C. T. *Dobrowolski*, 976 F.2d at 54; *see also Weiss v. School Bd.*, 141 F.3d 990, 996 (11th Cir. 1998).

29. The plaintiffs also contend, Plaintiffs' Brief at 30, that the February 5 PET predetermined C. T.'s placement in the self-contained classroom at Pettingill School before the IEP was developed, alleging a violation of section 9.9 of the state regulations, which requires that "[a]ny proposal to change the placement of a student with a disability including any proposal to transfer . . . special education services shall be based on the student's Individualized Education Program . . . ." The regulation also provides that parental consent is not required as a condition of placement. The hearing officer dealt with this issue as follows:

> The parents argue that the placement in the self-contained classroom was predetermined by the school before the February 5 meeting. Evidence makes it clear that the school and the parent were in disagreement regarding the student's placement at the January 14 PET meeting. The parents wanted the student out of the regular classroom. They presented the team with a document that spelled out what they wished in the student's program. In an effort to respond to the parents' insistence for a more restrictive placement, the school scheduled a system PET for February 5.
>
> The school was clear that they felt the program offered in January would meet the student's needs, given time; they were not recommending a self-

> contained program. The parent [sic] was equally clear that they wanted a small classroom setting with intensive special education instructive [sic] in a highly restrictive program. The school in an attempt to address the parents' concerns set up meetings for the parent [sic] to view options in the district that were more restrictive. . . . When the team assembled in February, the parents had visited the programs in the district that offered the type of placement requested by the parent [sic]. The conversation at the system meeting was a broad discussion of the student's needs, his strengths, the parents [sic] concerns and possible solutions to meet the parents' concerns and the student's needs. In an ideal situation, the PET would have developed an IEP, debated the components of the IEP, the goals and objective and then determined the appropriate placement. The parties were way beyond that phase by February.
>
> If the outcome of the meeting was pre-determined, it was predetermined by both parties. By the time the parties met in February the parents had already made up their minds that the self-contained program was not going to meet the student's needs. They were certain that the student required placement in the private school, and had already completed the initial steps to enroll him there. From the school's perspective the self-contained classroom was the only option left to the student if he was to remain in the district. There was not a predetermination of placement, but an attempt by the school to negotiate a placement with the parent [sic] that kept the student in a less restrictive environment than the private school.
>
> "[The school] shall ensure that the parents of each child with a disability are members of any group that makes decision [sic] on the educational placement of their child." 300.501(c). The discussion around placement was extensive; the parents participated fully and had the assistance of four advocates. In the end, there was no consensus. When the team fails to come to consensus, the school must make a decision, subject to the parent's right to exercise due process. The parents did not agree with placement in the self-contained program, but failed to exercise these rights. They removed him from school shortly after the meeting and enrolled him in the private school. If the parents are active participants in the discussion, regardless of whether they ultimately agree, no "predetermination" has occurred.

Administrative Record at 309-10. Again, the hearing officer's conclusions are well reasoned. It is ironic at best that the parents, who argued almost from the beginning that the services provided by the defendant at Martel School were not sufficiently restrictive, now take the position that the defendant had by February 5 predetermined C. T.'s placement in a restrictive, self-contained classroom when none of the representatives of the defendant took the position that anything more restrictive than the

program at Martel School set out in the January IEP was necessary. The defendant had nothing other than the self-contained classroom to offer the plaintiffs to address their demands for a more restrictive placement. It should be noted here again that the February IEP was a draft proposal. No violation of the IDEA has been established on this point.

30. The plaintiffs' final procedural challenge asserts that 34 C.F.R. § 300.350 was violated because the placement offered by the defendant at the February 5 meeting was not then available, because the self-contained classroom at issue was at its full licensed capacity. Plaintiffs' Brief at 30. The hearing officer addressed this claim as follows:

> The parents asserted that the school was in violation of procedure because the self-contained program being discussed at the February 5th PET was at capacity, therefore making it unavailable to the student. Regulations do not require that a placement be available in order for the PET to recommend it. Regulations require that "the IEP is implemented as soon as possible following the [Pet [sic] meeting]." Maine regulations give further guidance in this area by stating that schools must implement the IEP as soon as possible or reconvene the PET to develop alternative arrangements to address the needs of the disabled student. [See MSER, Section 9.8] There is no restriction on recommending a placement because the placement is not immediately available. The school made a convincing argument that the placement would likely be available in the near future, or could be made available through an acceptable process such as a waiver granted by the Department of Education. There was no violation.

Id. at 310. Again, I find this conclusion to be fully supported by the record. I add the observation that the fact that the classroom was at capacity on the day the PET recommended placement there for C. T. does not meant that the defendant could not provide services to C. T. in accordance with the proposed IEP, as 34 C.F.R. § 300.350(a) requires, had the IEP been adopted as written. Section 5.15 of the state regulations allows schools to apply for waivers of such limitations and the waivers may continue in force through the end of the school year in which they are requested. Curtis also testified that students frequently transferred out of the self-contained program. Hearing Tr. at 58. There was no violation of the IDEA in this respect.

4. Substantive Challenges

31. The plaintiffs contend that each of the three IEPs developed for C. T. were substantively deficient. Plaintiffs' Brief at 30-33. The defendant argues that the plaintiffs did not contend before the hearing officer that either the December 1998 or the January 1999 IEPs were inappropriate and that this failure to exhaust means that the claims may not be pursued in this court. Defendant's Brief at 10. Contrary to the plaintiffs' assertion, Plaintiffs' Response at 4-5, the adequacy of these IEPs is not necessarily implied as an issue by the text of the plaintiffs' pre-hearing memorandum to the hearing officer, Administrative Record at 9-10. However, the issue is presented in the plaintiffs' post-hearing brief, *see, e.g., id.* at 62-70, and was addressed by the hearing officer, *id*. at 311. The question of the adequacy of each of the IEPs is appropriately before this court.

32. The First Circuit has held, with respect to a court's substantive review of an IEP, that

> [t]he Act does not mandate, nor has any court held it to require, that the district judge must consider each unique need in isolation and make a separate finding regarding the preponderance of the evidence in each and every identified area. Such a requirement would serve merely to balkanize the concept of educational benefit and to burden the district courts without producing any offsetting advantages. We hold that no such requirement exists, In the last analysis, what matters is not whether the district judge makes a series of segregable findings, but whether the judge is cognizant of all the child's special needs and considers the IEP's offerings as a unitary whole, taking those special needs into proper account.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1090 (1st Cir. 1993). The following discussion of the IEPs at issue is informed by this directive.

33. The plaintiffs claim that the December and January IEPs violated 34 C.F.R. § 300.346 and section 9.3 of the state regulations. Plaintiffs' Brief at 30-31. Specifically, they contend that these IEPs failed to address C. T.'s processing and written language deficits and his emotional, social and behavioral issues; that they ignored the recommendations of his parents, tutor and treating professionals; and that they did not address his anxiety, attention issues, speech and language deficits,

math deficits and need for placement with one-on-one instruction with minimal distraction. *Id*. at 31. In addition, they assert that the IEPs contained only vague goals and annual, as opposed to short-term, objectives; provided only "ill-defined" resource service; and stated no present levels of performance to serve as baselines for measuring growth. *Id*. Finally, the plaintiffs contend that placement at Martel School was "completely inappropriate," because C. T. was "failing in the mainstream educational environment" and was in "physical danger," apparently a reference to three instances in which C. T. was hit or kicked by classmates. *Id*. at 32. The hearing officer discussed the substance of the December and January IEPs as follows:

> The initial IEP does not address all areas of the student's disability. The evaluations reviewed by the PET in December made clear that the student showed a written language deficit. Results of both the psychological assessment and the educational assessment support a need for intervention in the written language arena. Additionally, the record supports the student's need for behavioral intervention. The classroom behaviors, coupled with the parents' description of the extreme behavior at home, should have guided the PET to include IEP goals in each of these areas in December. In January the IEP was modified to address the area of written language, but still no goals to address the student's identified need for social skills training or behavioral interventions were included. However, the student's work did begin to improve after these interventions. The standard for a "free appropriate public education" is defined as a program which is "reasonably calculated to enable the child to receive education [sic] benefit." The IEPs were incomplete, but there was evidence of benefit.
>
> * * *
>
> The student did struggle, but he began to show improvement after services were initiated. There is indication that there was some educational benefit. In addition, each of the programs offered by the school offered the student the right to be educated with non-disabled peers. Students have the right under special education law to "be involved and progress in the general curriculum . . . and to participate in extracurricular and other nonacademic activities; and to be educated and participate with . . . non-disabled children." § 1414(d)(1).

Administrative Record at 311-12. The plaintiffs contend that the hearing officer's findings concerning the shortcomings of these IEPs entitle them to relief. Plaintiffs' Brief at 29, 33. However, the hearing

officer also found that C. T. obtained educational benefit from these IEPs. In light of that finding, no relief is warranted.[10] *Rowley*, 458 U.S. at 200 (IDEA requires that student be

[10] Despite her finding that C. T. derived some educational benefit from the December and January IEPs, the hearing officer appears to have based her award of partial costs of the Southern Maine Learning Center enrollment from February through June 1999 on the failure of the defendant to include in those IEPs "all the components to meet [C.T.'s] identified needs." Administrative Record at 313. Such an award is inconsistent with the finding that the IEPs, despite these shortcomings, provided C. T. with some educational benefit. The award will be discussed below in connection with the defendant's counterclaim.

provided with access to program that confers "some educational benefit" upon him). The hearing officer's finding is supported by the evidence; nothing further is required.[11] I do note, however, that there is no evidence that C. T. was "failing" in the mainstream environment at Martel School after the first IEP was implemented, nor is it reasonable to conclude that C.T. was in "physical danger" based on the three incidents in which C. T. apparently was hit or kicked by, or scuffled with, other students during the five months he was at Martel.[12] Hearing Tr. at 77-81, 303, 330, 344.

34. The plaintiffs' post-hearing submission to the hearing officer focused primarily on the proposed placement in the self-contained classroom at Pettingill School rather than any perceived substantive inadequacies in the IEP itself, as does their brief here. Administrative Record at 63-70; Plaintiffs' Brief at 32-33. With respect to the February IEP, the hearing officer found that

> [t]he IEP proposed after the February meeting, which places the student in the self-contained classroom, addresses all of the student's identified needs. There is reason to believe, based on the testimony of the evaluating psychologist that this placement will provide the setting and adult support he requires to address his need for structure and consistency. The goals and objectives in the IEP describe interventions that address his identified academic and behavioral needs. The placement in a regular elementary school will give him access to non-disabled peers and will provide him an opportunity to participate in extracurricular and mainstream activities. The school housing the self-contained program is closer [than the Southern Maine Learning Center] to the school he would attend if he were not disabled. There is no way to evaluate its appropriateness, but it contains all the elements that would lead the reader to believe that there would be educational benefit.

[11] Even if this were not the case, the facts that the first IEP was replaced after only nine school days, the plaintiffs requested a third IEP and then removed C. T. from the defendant school system before it was reasonably possible to measure the degree of educational benefit or lack thereof obtained from implementation of the second IEP, and that the hearing officer reasonably concluded that the third IEP was likely to provide C. T. with educational benefit make it unnecessary to determine whether the first two IEPs actually provided C. T. with an educational benefit. In addition, even any of the violations alleged by the plaintiffs did occur, under the circumstances the financial penalty imposed by the hearing officer is sufficient to provide redress.

[12] The plaintiffs cite no authority to support their assumption that the IEPs were inadequate because they failed to address perceived verbal and physical harassment of C. T. by his peers. There is no evidence in the record to allow a reasonable factfinder to conclude that this harassment was due to C. T.'s disabilities. While the school system obviously has an obligation to attempt to stop inter-student harassment whenever it occurs, the IDEA does not provide the route to relief for students and their parents when such activity is not shown to result from the student's disability.

Administrative Record at 311. Other than a conclusory statement that the February IEP "failed to meet the substantive requirements under IDEA as articulated by *Rowley*," Plaintiffs' Brief at 33, which is insufficient to allow this court to address the issue, the plaintiffs do not dispute the hearing officer's conclusions concerning the goals and objectives set forth in the February IEP. They challenge the placement because the Pettingill self-contained classroom is "overcrowded" and one in which the Pettingill principal and special education teachers allegedly "expressed substantial doubt concerning its ability to meet C. T.'s needs." *Id.* at 32. Whether the classroom, which had a teacher and two full-time aides for 13 students, Hearing Tr. at 135, was "overcrowded" is a question to be decided by the state department of education, which sets maximum student-teacher ratios for self-contained special education programs, State Reg. § 5.7(C), and requires the physical accommodations to be comparable to those in which regular education is provided, *id*. § 5.7(D); it is not a matter to be determined by each student's parents. No doubt a larger, brighter and quieter classroom would have been better for C. T., but that is not the test under the IDEA for an appropriate placement. To support their assertion that the principal and teachers at Pettingill expressed "substantial" doubt about the likelihood that their self-contained program could meet C. T.'s needs as described by his parents, the plaintiffs cite their own perception of what the principal said to them when they visited the school, Hearing Tr. at 338, 502; Administrative Record at 113, the principal's equivocal statement at the February 5 PET meeting as transcribed by an unknown person from the plaintiffs' tape recording, Administrative Record at 165-66, and their own memory of a statement during their visit to Pettingill by a special education teacher who would not be teaching C. T., Hearing Tr. at 339, Administrative Record at 194. The principal testified otherwise at the due process hearing, Hearing Tr. at 175-76, 181-82, stating that after he had spoken with the teachers who had worked with C. T. at Martel, he had concluded that the Pettingill program was "quite appropriate" for C. T., *id*. at 182-83. This evidence does not persuade

me that the plaintiffs' position is correct and, in any event, this evidence does not predominate in the record on this point. The testimony of Curtis, the Pettingill principal, the Martel special education coordinator, C. T.'s regular education teacher, and the school psychologist all supports the hearing officer's conclusion that the Pettingill placement was appropriate.[13]

35. Throughout their submissions, the plaintiffs emphasize C. T.'s behavior at home while he was enrolled at Martel School, comparing it with his behavior at home during his third-grade year at the parochial school and contrasting it with his behavior during his fourth-grade home schooling. They assert that he began to have anxiety attacks, engage in violent and oppositional behavior at home, and suffer from inability to sleep "immediately" upon his enrollment at Martel.[14] Plaintiffs' Brief at 6. They do not suggest in any way that the deterioration in his behavior at home increased during the period at the beginning of the second quarter when his academic performance declined significantly. It is clear, although never stated expressly, that the plaintiffs contend that any IEP or placement for C. T. that did not seek to improve his behavior at home and was not reasonably calculated to have that effect would be inappropriate under the IDEA. However, a student's behavior must be addressed by an IEP only when that behavior affects the student's ability to learn in a significant way. *Evans v. District No. 17 of Douglas County*, 841 F.2d 824, 831 n.7 (8th Cir.

[13] To the extent that harassment of C. T. by other students at Martel School was a valid concern of the PET and his IEP, moving C. T. to the Pettingill self-contained classroom would move him away from those students.

[14] This view is somewhat inconsistent with that of C. T.'s treating psychiatrist, who opined on October 14, 1998 that C. T. was "doing . . . well." Administrative Record at 264.

1988). The evidence in this case is that, except for the first half of the second quarter of the school year, C. T.'s ability to learn was not significantly limited by his disabilities; his behavior at home does not appear to have affected his performance and behavior at school.[15] Even when a student's behavioral problems at home are severe, an IEP placing the student in a self-contained classroom where he is achieving educational benefit is sufficient under the IDEA. *Hall v. Shawnee Mission Sch. Dist.*, 856 F. Supp. 1521, 1524-29 (D. Kan. 1994). *See also Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378, 386-87 (D. Me. 1995); *Swift v. Rapides Parish Pub. Sch. Sys.*, 812 F. Supp. 666, 671, 672-73 (W.D.La. 1993). The February IEP appears to meet this standard.

C. The Defendant's Counterclaim

36. The hearing officer awarded the plaintiffs one-half the costs of C. T.'s attendance at the Southern Maine Learning Center between February 22 and June 14, 1999, including transportation costs, as a remedy for its failure to identify C. T. in a timely manner. Administrative Record at 313. Specifically, the hearing officer found that

> [t]he lack of action by the PET on August 31 . . . is a failure on the part of the school to comply with procedure. The PET had a clear request from the parent to evaluate the student and assess his eligibility for special education services. They presented the school with evaluative and anecdotal data to support their concerns that their son was in need of such services. The student had a confirmed diagnosis of Attention Deficit Disorder and Bi-polar Disorder. Clearly, the information was not conclusive. The PET could not have made a determination for eligibility based on this information. However, the information was sufficient for the PET to order further evaluations at that time. Although he had achieved at grade level during his previous school year, this had been accomplished through individual tutoring outside of school. Waiting to see if an identified diagnosis creates an adverse effect on a student's education is not a prerequisite to proceeding with the eligibility determination process.
>
> The school argues that the parents participated in the August meeting and agreed with the decision to wait and see if the student's ADHD and Bi-polar

[15] Indeed, far from being violent at school, C. T. is described by his parents as being harassed by fellow students without provocation. Hearing Tr. at 303, 330-31, 344-45.

> Disorder created an adverse effect on his education. It is true that the parents did not disagree with this decision. However, the school has an affirmative obligation to determine if students are in need of special education services. When there is expressed concern that a student is in need of support, that student should not have to fail in a regular classroom before the school exercises this obligation. There was sufficient data for the PET to order evaluations in August, rather than waiting until October.
> . . . [H]ad the evaluation process begun earlier, the student would have been found eligible for services by mid-October and, arguably, might not have failed most of his subjects for the second quarter.

Administrative Record at 307-08. The defendant argues that the hearing officer erred in finding a violation under these circumstances because the decision to defer evaluation was reasonable under the circumstances, the parents did not object to it, and it was not barred by state or federal regulation. Defendant's Brief at 19-21. In the alternative, it contends that, even if the decision to defer evaluation violated the IDEA, it did not harm C. T. because the time limits set by the state regulations for the steps that would follow a decision to evaluate C. T. made at the August 31 meeting, if used to their full extent, would result in the provision of special education services to C. T. on approximately the same day they were actually first provided. *Id*. at 22-24.

37. However, the record makes clear that the defendant never took the maximum number of days allowed by the state regulations to perform required tasks, nor does there appear to be any reason why it would have done so. When the decision to evaluate was made, the consent form was presented to the parents and signed immediately, not 15 school days thereafter. When the test results had been received, an IEP was written one day later, not after 30 school days. The important point here is that C. T. would have received services sooner if evaluation had begun on September 1, and, as the hearing officer reasonably concluded, the precipitous drop in C. T.'s performance in November and early December might thereby have been avoided. It is clear from the evidence in the record that C. T. was harmed, educationally and emotionally, during this time. The defendant describes its inaction in this case as not "actually violat[ing] the letter of the law." *Id*. at 25. To the contrary, despite the

plaintiffs' lack of objection, it is reasonable to conclude that that is just what the defendant did, *see generally* 20 U.S.C. § 1412(a)(2) & (3), and it certainly violated the spirit of the IDEA in any event. The hearing officer's conclusion that the decision to defer evaluation was not reasonable under the circumstances is supported by a preponderance of the evidence in the record. The plaintiffs' lack of objection, equivocal at best, *see* Hearing Tr. at 151-52 (Testimony of the Martel School special education coordinator: "They probably would have liked to see it move faster, but they were okay with it." "I think they were anxious to get [the process] started . . ."); 281 (Testimony of Mr. T.: "I didn't agree to it, but it seemed like I had no other choice at the time."); 474 (Testimony of Mr. T.: "I didn't think I could change [the decision to defer] at the time."), does not absolve the defendant of its basic obligation in this instance. Once a student with psychiatric diagnoses has been referred for evaluation, evaluation should begin promptly.

D. The Remedy and The "Stay Put" Provision

38. The plaintiffs contend that they are entitled to reimbursement in full for the costs of C. T.'s placement at Southern Maine Learning Center for the remainder of the 1998-99 school year as a remedy for the defendant's delay in evaluating C. T. The hearing officer awarded only half of those costs due to the plaintiffs' "fail[ure] to exercise any due process rights they have on behalf of the student" and the fact that they "moved to place the student without considerations of the student's right to an education in the least restrictive environment." Administrative Record at 313.[16] The plaintiffs argue that this partial award "erroneously place[s] partial blame" on them "for [the defendant's] failure to act in a timely and effective basis [sic]." Plaintiffs' Brief at 14. This is not a situation in which the hearing officer awarded the parents reimbursement of tuition for a private school in which

[16] Because the hearing officer's conclusion that the IEP proposed in February 1999 would have provided C. T. with a free appropriate public education under the IDEA within the defendant school system is supported by a preponderance of the evidence, it is unnecessary to address the question whether the Southern Maine Learning Center provides the least restrictive environment in which (continued…)

they unilaterally placed their child after finding that the placement was justified; rather, it is a situation in which the hearing officer sought an appropriate remedy for a past violation
that was remedied before the unilateral placement took place. The plaintiffs refused to consider the proposed February IEP, which they received before C. T. actually began classes at the Southern Maine Learning Center. They did not seek a due process hearing after the August 31 PET, or even after they had decided to place C. T. in the private school. The sanction chosen by the hearing officer is appropriate, under the unique circumstances of this case. It is enough to punish the defendant for its violation without rewarding the plaintiffs for ignoring the procedural remedies available to them and set out in the handbook they received, or for their unilateral placement, which was not warranted under the IDEA.

39. The plaintiffs contend that the hearing officer's "most significant error . . . was when she decided an issue with regard to C. T.'s 1999/2000 academic year placement when that issue was not addressed or briefed at the due process hearing, thereby denying C. T. his 'stay put' remedies under IDEA." Plaintiffs' Brief at 17, 37-39. This is an apparent reference to the following order included in the hearing officer's decision: "The PET shall convene before the beginning of the 1999-2000 school year to review and revise as necessary the IEP proposed by the school that places the student in the self-contained classroom at the Pettingill School." Administrative Record at 313. Contrary to the plaintiffs' interpretation, this sentence does not "order[] a placement," Plaintiffs' Brief at 37, but rather directs the parties to convene another PET meeting to consider the IEP proposed in February 1999, which the hearing officer found sufficient to provide C. T. with a free appropriate public education. It is possible, although unlikely based on the record, that the parties could agree to a revised IEP and a different placement at such a meeting. The February IEP was clearly an issue before

C. T. could derive educational benefit or is otherwise an appropriate placement for him.

the hearing officer; four of the nine issues presented by the plaintiffs for resolution by the hearing officer deal with that IEP. Administrative Record at 9-10; *see also* the defendant's pre-hearing memorandum, *id*. at 8. The defendant points out, Defendant's Brief at 46, that the February IEP was intended to apply until February 2000, Administrative Record at 199, so the hearing officer's directive correctly makes that IEP the basis of the PET meeting before the beginning of the 1999-2000 school year. The hearing officer neither exceeded her authority nor erred in issuing this directive.

40. Finally, the plaintiffs argue that the hearing officer "stripped [C.T.] of his 'stay put' entitlement" under 20 U.S.C. § 1415(j) by her "error in deciding a placement for the 1999/2000 school year." Plaintiffs' Brief at 38. I have concluded that the hearing officer made no such error, and accordingly it appears that the plaintiffs' argument on this point is moot. To the extent that the plaintiffs' claim that they are entitled to reimbursement from the defendant for all of the costs associated with C. T.'s enrollment at the Southern Maine Learning Center from February 22, 1999 to the present[17] remains viable, it is without merit. The cited statute provides:

> Except as provided in [a subsection not relevant to the instant case], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j). The Supreme Court has held that this subsection of the statute, then found at 20 U.S.C. § 1415(e)(3),

> operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts

[17] The plaintiffs present this as a request for injunctive relief, Plaintiffs' Brief at 2, 39, despite their failure to comply with this court's Local Rule 9(b) in their complaint (Docket No. 1) or brief. The only aspect of the claim that might be appropriate for injunctive relief would be payment for future costs of C. T.'s enrollment at the unilateral placement chosen by the plaintiffs, and such relief is not appropriate for the reasons stated in the text.

> ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3).

School Comm. of Town of Burlington v. Department of Educ., 471 U.S. 359, 373-74 (1985). The First Circuit has held that unilateral placement in a private school does not give rise to a right to reimbursement unless it is finally adjudged both that the parents' placement was appropriate and that an inappropriate IEP, or none at all, had been developed by the school district. *Roland M.*, 910 F.2d at 999-1000. Here, the court's determination that the proposed IEP was appropriate bars any claim for reimbursement under the "stay put" provision of IDEA.

III. Conclusion

For the foregoing reasons, I recommend that judgment be entered in favor of the defendant on all claims.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 27th day of July, 2000.

David M. Cohen
United States Magistrate Judge

MR & MRS T, as parents and next friends of C.T., a minor
plaintiff
[term 12/21/99]

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